

BUSINESS LAW SECTION

CORPORATIONS COMMITTEE

COMMITTEE MEETING MINUTES FOR FEBRUARY 1, 2002

**Friday, February 1, 2002
Los Angeles**

A regular meeting of the Corporations Committee (the "Committee") of the Business Law Section of the State Bar of California was held at the Marriott Hotel (Los Angeles Airport) on February 1, 2002. Attendance was as follows:

MEMBERS PRESENT:

Keith Paul Bishop
Bruce Dravis
James K. Dyer, Jr
Teri Shugart Erickson
James F. Fotenos
Steven K. Hazen
Carol K. Lucas
B. Keith Martin
David M. Pike

Cynthia Ribas
Randall B. Schai
James R. Walther
Neil J Wertlieb
Nancy Wojtas

MEMBERS ABSENT:

David S. Caplan
John C. Carpenter
Nelson D. Crandall
Timothy J. Fitzpatrick
Mark T. Hiraide
Eileen Lyon
Brian D. McAllister
Ethna M. Piazza
Daniel J. Weiser

LIAISONS PRESENT:

Christine Connolly, NASD
Todd Vlaanderen, Secretary of State

GUESTS PRESENT:

R. Bradbury Clark, Nonprofit Organizations Committee
Robert F. Stansell, Executive Committee

The minutes summarize discussions primarily in the order items were listed on the Agenda for the meeting previously circulated to members of the Committee, which is not necessarily the order in which the items were actually taken up at the meeting. The Committee did not take up those topics listed on the Agenda which are not described in these Minutes.

I. ADMINISTRATIVE MATTERS.

A. Opening Remarks and Announcements. The meeting was brought to order by Co-Chair James Walther at approximately 9:30 a.m. Co-Chair Neil Wertlieb noted that the next meeting of the Committee will be in Sacramento on March 1st and will include lunch with members of the Partnerships and LLC Committee and invited guests from the state legislature. Mr. Wertlieb also noted that the April 5th, 2002 meeting of the Committee will be held by videoconference, with locations at Mayer Brown, Rowe & Maw in Palo Alto and Milbank, Tweed in Los Angeles. Mr. Wertlieb also said that, at the suggestion of Nelson Crandall, a new topic of discussion, practice issues, has been added to the agenda so that the Members may devote a few minutes at each meeting to discussion of practice issues of interest to the group. Mr. Wertlieb also reported that he

had received an email from Suzanne Graeser, northern California liaison from the Business Law Section Executive Committee, in which Ms. Graeser stated that the Corporations Committee is permitted to comment on federal securities legislation, subject to the same rules and procedures as are applicable to comment on state legislation. Ms. Graeser also noted that the opinion report will be a publication of the Business Law Section. Finally, Mr. Wertlieb stated that John Carpenter, liaison to the Ad Hoc Committee on ADR, reported that the ADR Committee would like to make a presentation to the Corporation Committee regarding alternative dispute resolution provisions in contracts. Members expressed their interest and approval of this suggestion.

B. Approval of Minutes of January 4, 2002 and December 7, 2001 Meetings. The draft minutes of the meetings of the Committee held on January 4, 2002 and December 7, 2001 and previously circulated to the members were approved with minor changes.

II. LIAISONS' REPORTS AND DISCUSSION.

A. Executive Committee. Robert Stansell, southern California liaison from the Business Law Section Executive Committee, reported on recent activities of that committee. The Executive Committee is organizing the Spring Meeting of the Business Law Section, which will be held May 17-19 in La Costa. Mr. Stansell suggested sending an invitation to all persons who are on the Committee's "interested parties" mailing list. Mr. Stansell also reported that the constituency subcommittee is preparing a mailing to be sent to all Business Law Section members encouraging participation in Business Law Section activities.

B. Secretary of State. Todd Vlaanderen, liaison from the Secretary of State's office, noted that his office will be posting practice tips on the Secretary of State's web site for filing documents. He asked that any Members with comments contact him.

C. NASD. Christine Connolly introduced herself as the new liaison from the NASD, replacing Lawrence Harasym. Ms. Connolly summarized recent activities of the NASD. She reported that the SEC had recently amended its books and records rules regarding broker/dealer recordkeeping, effective May 2, 2003 (NASD Notice to Members 01-80). She also reported that the NASD Office of the General Counsel has a new online publication concerning disciplinary actions, available at www.nasdr.com. Ms. Connolly also noted that the 2002 NASD Securities Conference will be held April 22-24 in Washington, D.C. and that local NASD offices will be conducting outreach seminars in Los Angeles, Orange County and San Diego on July 9, 10 and 11. Further, Ms. Connolly encouraged members to contact her if they have any questions regarding NASD rules or practice. The Committee extended its thanks to Mr. Harasym for his participation on the Committee.

D. Partnerships and LLC Committee. Steven Hazen reported on the activities of the Partnerships and LLC Committee. He noted that the committee will meet on February 7th. Mr. Hazen stated that a subject the committee is considering is whether there are special issues that should be considered in the use of LLC's as special purpose, bankruptcy-remote, entities for financing purposes. He suggested that this issue may present an opportunity for closer coordination between the Corporations Committee and the Partnerships Committee. Mr. Hazen asked for questions, thoughts and ideas on this topic.

E. UCC Committee. Jim Dyer reported that the UCC Committee is meeting the week of February 4th. He reported that the committee has completed its model control agreement (relating to deposit accounts) and will publish it in the ABA Journal. Mr. Dyer noted that the UCC Committee is also monitoring the implementation of new UCC Article 9. He said that the Secretary of State's office has changed file numbers for some limited liability companies, creating potential problems when filing UCC statements (which require a file number). He also noted that the committee is considering how to deal with a trust as a debtor when filing a UCC financing statement. The UCC does not specifically address this situation, but the UCC committee suggests that the trust be listed as the debtor on the UCC financing statement and that the individual trustees be treated as the debtor for all other purposes. However, this creates a potential problem since trustees often

change, giving rise to repeated amendments to previously filed UCC financing statements. Mr. Dyer also reported that the committee is monitoring a national effort to revise Article I of the UCC (definitions and jurisdiction).

F. Health Law Committee. Carol Lucas reported that the next meeting of the Health Law Committee is scheduled for February 15th in Sacramento, at which Terry Miller from the State Bar of California, Office of Governmental Affairs will talk about the legislative process. The committee gave a presentation at the Winter Education Institute in San Diego regarding formation of professional corporations. She also noted that the committee's web site is now operational.

G. Non-profits Committee. Bradbury Clark, liaison from the Nonprofits Committee reported that the committee will be meeting the week of February 4th. Mr. Clark led a discussion regarding SB 324, which eliminated the requirement that a disappearing domestic stock corporation or other entity obtain a tax clearance certificate in connection with a merger with a surviving domestic stock corporation. Mr. Clark argued that this provision also applies to nonprofit corporations. Mr. Stansell noted that the bill was sponsored by the Franchise Tax Board and that it may be advisable to ask the FTB to clarify its intent. On a different topic, Mr. Clark said that he could arrange for someone to appear at a future meeting of the Committee to make selective comments on the Nonprofit Corporation Law with a focus on its differences from the General Corporation Law.

III. PENDING LEGISLATION/AFFIRMATIVE LEGISLATIVE PROPOSALS.

A. Report of Legislative Liaison. Mr. Fotenos reported that the Committee's proposed legislation to amend Section 710 of the Corporations Code was being reviewed by legislative counsel and would be introduced by Senator Romero on or about February 22nd. He reported that the State Bar Office of Governmental Affairs had reviewed approximately 100 recently introduced bills and had not yet found any that would be of interest to the Committee.

B. SB399 (corporate conversions). Mr. Wertlieb reported that this bill was held up during the last legislative session because of a requested change from legislative staff that creditors and "claimants" of an entity converting to corporate form receive prior notice of the conversion. The Committee objected to this change, since it appeared to add a level of uncertainty to the conversion process. Mr. Wertlieb noted that he has had discussions with counsel to the Senate Judiciary Committee concerning the proposed notice provision and the penalty for breach. Suggestions were that the definition of "claimant" be clarified (perhaps "known claimant" or a good faith provision re: identifying claimants) and that the proposed remedy be clarified and quantified. Counsel to the Judiciary Committee said that the sole remedy should be a financial penalty of \$50-100 per each creditor/claimant who does not receive the required notice, up to a maximum aggregate penalty of \$5,000, to be assessed by the Attorney General. Members debated the pros and cons of (i) leaving the language "as is," i.e. without a specific penalty, (ii) adding a financial penalty, so that the risk of noncompliance is quantified, or (iii) dropping the bill altogether. A motion was made to vote on accepting the bill as written (without the financial penalty). The motion passed on a vote of 8 yes votes, 4 no votes and 1 abstention, subject to final review by the Executive Committee.

C. Section 25102(o) Emergency Regulation Comments. Mr. Wertlieb reported that the Committee received an invitation to comment on the proposed 25102(o) regulations and should prepare a comment letter. He said that the Committee should work with Meredith Jackson, Executive Committee Vice-Chair for Legislation, to draft a comment letter. Keith Bishop stated that he would like to see California adopt a blanket exemption for stock options, as do approximately 34 other states. He suggested deleting all cross-references to Commissioners rules from Section 25102(o) and/or exempting all options that comply with SEC Rule 701. The Committee requested that Mr. Bishop prepare a legislative proposal amending Section 25102(o) for the Committee's consideration. Members noted that the deadline for submitting proposals for this year's legislative session is February 22nd and that is probably not enough time to prepare a proposal and have it approved by the Executive Committee. The Committee then discussed the

advisability of exploring various alternatives for seeking prompt legislative action. Messrs. Stansell and Martin volunteered to participate in a working group with Mr. Bishop on this subject.

D. Section 710 (sunset on supermajority approvals). David Pike confirmed Mr. Fotenos' earlier report regarding the status of the proposed amendment to Section 710 of the Corporations Code.

IV. POTENTIAL AFFIRMATIVE LEGISLATIVE PROPOSALS.

A. Secretary of State Fax Filings. Mr. Dravis presented a proposal to the Committee to add new Sections 17.1 and 1500.1 to the Corporations Code to permit submission of documents with facsimile or photocopied signatures to the Secretary of State for filing. Members discussed several changes to the proposed language and Mr. Dravis said he would make revisions to the text and circulate a revised draft to Members later in the month and, after receiving comments, would send a draft of the proposed legislation to the Secretary of State's office prior to the Committee's March 1st meeting.

B. Amend Finance Lenders Law. Mr. Bishop reported that he prepared a revised legislative proposal to amend the finance lenders law, which was included in the meeting materials for this month's meeting.

V. WEB SITE PROJECTS.

A. Recent Developments Page. Ms. Wojtas circulated a summary of recent developments to be included on the Committee's web site:

- SEC issues statement regarding its views on certain disclosure issues public companies should consider in drafting management's discussion and analysis of financial condition and results of operations.
- SEC announces first pro forma financial reporting case against Trump Hotels and Casino Resorts Inc.

VI. OTHER PROJECTS.

A. Opinion Project. The chair of each working group gave a status report on their group's work to-date. Mr. Fotenos then asked whether or not working group members should incorporate a discussion of the Silverado Accord in the discussion of the remedies opinion. Ms. Lucas said that since the Accord is not often used by practitioners the opinions project task force does not want to revisit Accord issues in the report now being drafted.

B. Educational Activities. Mr. Dravis reported that the panel on "down round" venture capital financings at the Winter Education Institute on January 20th in San Diego was very well received and is available on videotape for those who were not able to attend in person. Mr. Dravis said that he needs volunteers to participate in a panel presentation on Delaware versus California law for corporations at the Business Law Section Spring Meeting, May 17-19 at La Costa. Mr. Dravis also said he is seeking volunteers to prepare one or more panel presentations for the annual meeting of the State Bar in October. He noted that the deadline for submitting topics for presentations to the State Bar is February 20th. Ms. Lucas stated that a seminar on choice of entity has been popular in the past. Mr. Dyer stated that the fiduciary duties of directors would also be a good topic for presentation. Ms. Erickson said that a presentation on corporate law for the non-corporate attorney would also be valuable. Mr. Dravis asked for volunteers and firm proposals to make presentations at the annual meeting as soon as possible.

C. Other. Mr. Fotenos reported that in recently reported case from the California Court of Appeals, *Crowell v. Community Health Foundation*, the Court held that an arbitration provision that provided for judicial review of the arbitration award was not valid and voided the entire arbitration agreement, noting that there was no "savings clause" in the agreement.

The meeting was adjourned at approximately 12:30 p.m.

/s/ David M. Pike
David M. Pike
Secretary

Corporation Committee Meeting Minutes

